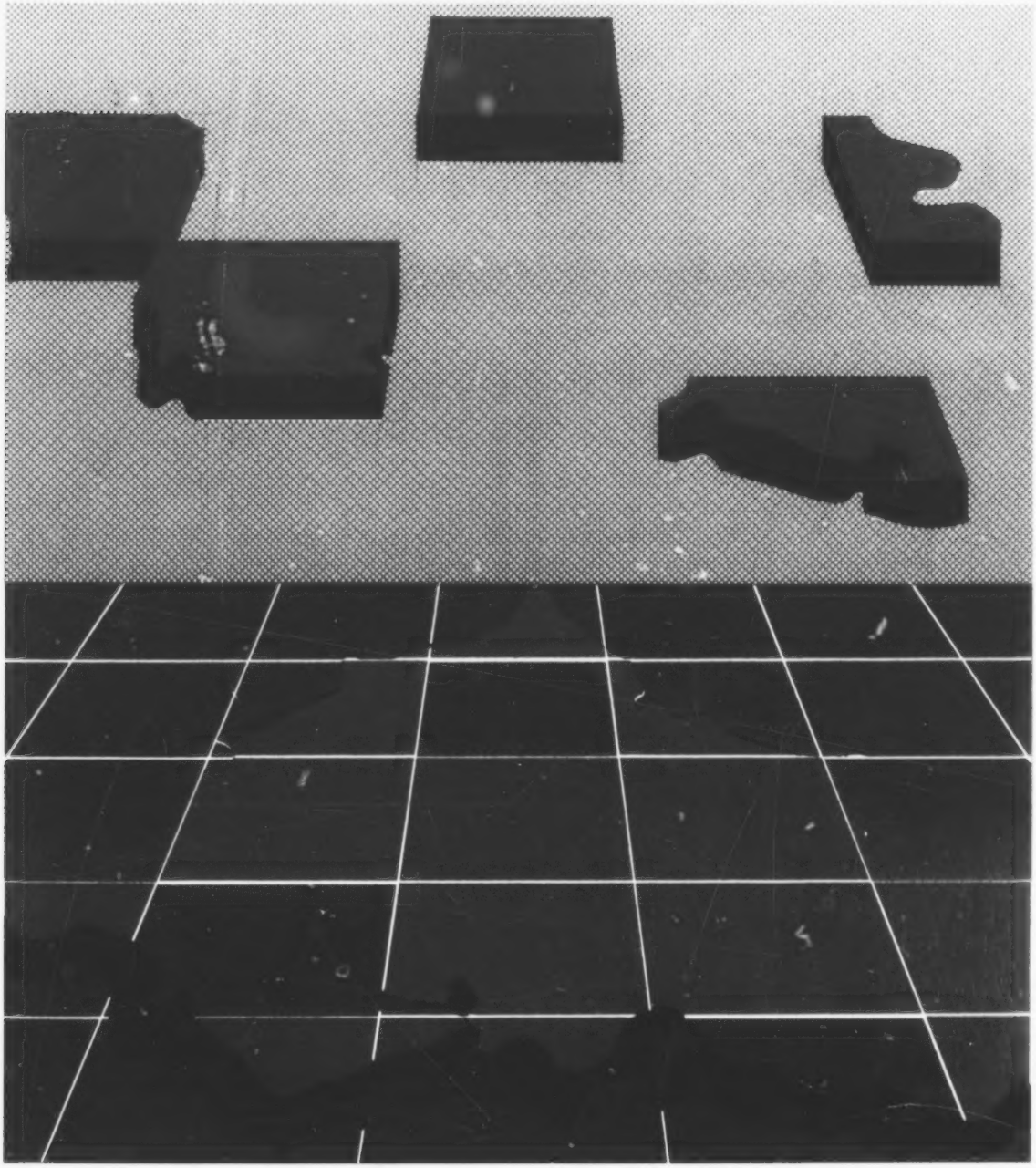
H31/2

HAWAII PUBLIC LIBRARY
OCT 30 1980
U. S. GOVT. PUBS.
DEPOSITORY 30%

Breach of Trust?
Native Hawaiian Homelands

October 1980



A summary of the proceedings of a public forum sponsored by the Hawaii Advisory Committee to the United States Commission on Civil Rights prepared for the information and consideration of the Commission. The contents of this report should not be attributed to the Commission, but to the individual participants who appeared before the Hawaii Advisory Committee.

CR 1.2:

THE UNITED STATES COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights, created by the Civil Rights Act of 1957, is an independent, bipartisan agency of the executive branch of the Federal Government. By the terms of the act, as amended, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study of legal developments with respect to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

THE STATE ADVISORY COMMITTEES

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 as amended. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

Breach of Trust?
Native Hawaiian Homelands

—A summary of the proceedings of a public forum sponsored by the Hawaii Advisory Committee to the U.S. Commission on Civil Rights

ATTRIBUTION:
Information and opinions in this report are those of the individual participants and the Hawaii Advisory Committee to the U.S. Commission on Civil Rights and, as such, are not attributable to the Commission. The report has been prepared by the State Advisory Committee for submission to the Commission for its information and consideration.

RIGHT OF RESPONSE:
Prior to the publication of a report, the State Advisory Committee affords to all individuals or organizations that may be defamed, degraded, or incriminated by any material contained in the report an opportunity to respond in writing to such material. All responses have been incorporated, appended, or otherwise reflected in the publication.

LETTER OF TRANSMITTAL

Hawaii Advisory Committee to the
U.S. Commission on Civil Rights
October 1980

MEMBERS OF THE COMMISSION
Arthur S. Flemming, Chairperson
Mary F. Berry, Vice Chairperson
Stephen Horn
Jill S. Ruckelshaus
Murray Saltzman

Louis Nuñez, Staff Director

The Hawaii Advisory Committee pursuant to its responsibility to advise the Commission on State civil rights issues, submits these proceedings on Native Hawaiian homeland issues.

In 1979 members of the Hawaii Advisory Committee found sparse and contradictory knowledge about the administration, management, and enforcement of native homesteading programs. Discussion of the homelands issue was often emotional and controversial. The Advisory Committee decided that providing a forum to discuss Native Hawaiian homelands would contribute towards a more informed public.

A public consultation was held on August 27, 1979, in Honolulu, Hawaii. This report summarizes the information presented that day.

We urge your review of the proceedings.

Respectfully,

Patricia K. Putman
Chairperson

Membership
Hawaii Advisory Committee to the
United States Commission on Civil Rights

Patricia K. Putman, Chairperson
Honolulu

Thelma I. Akau
Honolulu

Harry W. Brooks
Honolulu

Rai Saint Chu
Honolulu

Alma K. Cooper
Hilo

Arthur A. Corrales
Honolulu

Roy E. Crocker
Kaneohe

Dennis Kauahi
Ewa Beach

Louis H. A. Manuel
Nanakuli

Charles K. Maxwell
Pukalani, Maui

Florence Morinaga
Waimea, Kauai

Donnis H. Thompson
Honolulu

Chatt G. Wright
Honolulu

ACKNOWLEDGEMENTS

The Hawaii Advisory Committee wishes to thank the staff of the Commission's Western Regional Office, Los Angeles, California for its help in the preparation of this report. This project was the principal staff assignment of Jeffery N. Wallace with assistance from Sally E. James. Editing assistance was provided by Thomas V. Pilla with support from Irene Garcia and Grace Diaz. Legal review was provided by Laurie Campbell. All worked under the guidance of Philip Montez, Western Regional Office.

The staff of the Publication Support Center, Office of Management, was responsible for final preparation of the report for publication.

CONTENTS

1. Introduction 1
2. Historical Hawaiian Land System 3
3. Native Hawaiians Today 6
4. Hawaiian Homelands: State Responsibility 9
5. Hawaii Constitutional Convention of 1978 12
6. Legal Developments 15
7. Epilogue 18

Appendices

a. Letter from Frederick N. Ferguson, deputy solicitor, Office of the Solicitor, U.S. Department of the Interior 20
b. Letter from James W. Moorman, assistant attorney general, Department of Justice 26

1. Introduction

From the time the Hawaiian Islands were "discovered" by Western explorers in 1778 up to 1900, the Native Hawaiian population declined from approximately 300,000 to under 30,000. In addition to their declining population, "the Native Hawaiian language, dance and art were degraded and their land, property and religious systems were under constant attack from Western influences."[1]

On July 9, 1921, the U.S. Congress, acknowledging an obligation to the aboriginal peoples of Hawaii, enacted the Hawaiian Homes Commission Act (HHCA).[2] This act established a land trust of about 200,000 acres in Hawaii for the use and benefit of Native Hawaiians of 50 percent or more aboriginal blood. Although not stated in the act itself, an Hawaii Attorney General summarized its purpose in 1951:

> . . .to save the native Hawaiian race from extinction by reason of its inability to meet successfully the economic and sociological changes brought about in the islands. . .Hawaiians would be removed from the slums, be given land to work, and be taught to successfully live in the new cosmopolitan society. . .[3]

From 1921 to 1959 the homeland trust established by HHCA was administered by the Federal Government. In 1959 the territory of Hawaii was granted statehood. Responsibility for administration and management of the homeland trust was transferred to Hawaii under the Hawaii Admission Act as a condition of statehood.[4] In accordance with this transfer, Section 5 of the admission act provides that:

> (b). . .The United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title. . .to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended. . .(f) [t]he lands granted to the State of Hawaii by subsection (b) of this section. . .together with the proceeds from the sale or other disposition of any such lands, shall be held by said State as a public trust. . .

State responsibility for the homeland trust was delegated to the Hawaii Department of Hawaiian Home Lands (DHHL).[5]

While the State of Hawaii has both administrative and management duties relating to the homeland trust, the U.S. Government has retained some responsibility for the trust. First, if DHHL concludes that other public or private lands would better fulfill HHCA's mandate, DHHL can exchange homelands for other land of an equal value, but must obtain the approval of the Secretary of the Interior.[6] The U.S. Department of the Interior defines the relationship of the Federal Government to the homeland trust as ". . .More than merely ministerial or non-discretionary. . .the United States can be said to have retained its role as trustee under

[1] Fuchs, Lawrence H. *Hawaii Pono: A Social History.* Harcourt, Brace and World, Inc., New York, 1961, p. 16.

[2] C. 42, §1, 42 Stat. 108 (1920) (later omitted from 48 U.S.C. §§691-716) (hereafter cited as HHCA).

[3] Hawaii State Attorney General Opinion dated November 13, 1951, cited by Legislative Auditor, State of Hawaii, Financial Audit of the Loan Funds of the Department of Hawaiian Home Lands 1979, p. 4.

[4] Act of Mar. 18, 1959, Pub. L. No. 86-3, §5, 73 Stat. 4, as amended by Act of July 12, 1960, Pub. L. No. 86-624, §41, 74 Stat. 422 (hereafter cited as Admission Act).

[5] HAW. REV. STAT. §26 (1959).

[6] HHCA, Sec. 204(4) and Admission Act, Sec. 4.

the act while making the State its instrument for carrying out the trust."[7]

Second, the Federal Government retains enforcement power over the public homeland trust under Section 5 of the Hawaii Admissions Act:

> (f) Such lands. . .shall be managed and disposed of [by the State] for [the betterment of the conditions of Native Hawaiians] and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

According to the U.S. Department of Justice, this enforcement power gives them". . .exclusive litigation authority if suit were brought by the United States to enforce the trust."[8] However, the U.S. Department of Justice views "[t]he authority to initiate litigation [as] discretionary rather than mandatory."[9]

Third, HHCA cannot be amended or repealed by State legislative action without consent of the U.S. Congress. Exceptions are amendments to HHCA dealing solely with administrative matters and changes in the act to increase benefits for Native Hawaiian lessees.[10] Finally, the U.S. Congress has reserved the right to unilaterally amend or repeal HHCA.[11]

In March 1979 the Hawaii State Advisory Committee received reports from concerned citizens regarding the administration and management of the homeland trust. The reports included allegations that thousands of Native Hawaiians were on waiting lists for homesteads, some from up to 30 years, while the majority of the trust lands were being leased to the general public. Native Hawaiians also alleged that trust homelands were illegally confiscated by the State of Hawaii for use by the State's general population. Citizens complained that they were being deprived of their right to property under the HHCA and that they were not receiving equal protection of the law in the enforcement of the homeland trust.

On August 27, 1979 the Hawaii State Advisory Committee held a public consultation on the administration, management, and enforcement of the Hawaiian Homes Commission Act. This report summarizes presentations by participants at the consultation.

The State Advisory Committee issues this report to provide current information regarding the homeland trust to Native Hawaiian beneficiaries; government representatives with administrative, management, and enforcement responsibilities for the homeland trust; and the general public. The Advisory Committee hopes this report will be utilized by those implementing the homeland trust to better fulfill their respective duties. The State Advisory Committee will continue to monitor the progress of the homeland trust programs and report its findings to the Commission.

[7] Fredrick N. Ferguson, Deputy Solicitor, U.S. Department of the Interior, letter to Philip Montez, Regional Director, Western Regional Office, U.S. Commission on Civil Rights, August 27, 1979.

[8] James W. Moorman, Assistant Attorney General, U.S. Department of Justice, letter to Philip Montez, Regional Director, Western Regional Office, U.S. Commission on Civil Rights, August 13, 1979.

[9] Ibid.

[10] Admission Act, Sec. 4. Under this section, the State cannot change the qualifications of lessees and the definition of Native Hawaiian without United States consent.

[11] HHCA, Sec. 223.

2. Historical Hawaiian Land System

Richard Paglinawan
Mr. Paglinawan currently serves as deputy director of the Hawaii Department of Social Services and Housing on the island of Oahu. From 1968 to 1974, Mr. Paglinawan served as deputy director of the Department of Hawaiian Home Lands. A historian of Hawaiian ancestry, Mr. Paglinawan is noted for his expertise regarding ancient Hawaiian culture and lifestyle and his knowledge of Hawaiian homesteading projects including the land trust established by the Hawaiian Homes Commission Act.

Traditionally, land has been both the physical and spiritual focal point of the Native Hawaiian culture. The awareness of this "man to land" relationship provided a basis for consideration of the Hawaiian Homes Commission Act of 1920. Mr. Paglinawan presents an account of this traditional aboriginal Hawaiian land concept.

In 1778 English explorer Captain James Cook "rediscovered" the Hawaiian Islands. At the time, approximately 300,000 Hawaiians with a successful culture and an extensive land system inhabited the islands.

When Captain Cook arrived, the islands were not unified; rather, each island group was ruled by a high ranking chief and their lesser administrative chiefs. An island or a district was called a *moku* and was ruled by an *alli-'ai-moku,* literally, "the chief who eats the land."

The islands were also subdivided into territories called *ahupua'a* and was ruled by an *alii-'aiahupua'a,* literally, "the chief who eats the *ahupua'a.*" An *ahupua'a* usually included land that ran from the summit of a mountain to the sea; in some cases it ran into the sea and included fishing rights. Ahupua'a were usually bounded by gullies or mountains which ran parallel to the sea and were self-sufficient in natural resources.

Ahupua'a were further subdivided into land sections called *'ili.* Like the *ahupua'a, 'ili* were usually self-sufficient in natural resources. The *ili* was ruled by a *Konohiki.*

The ancient Hawaiian social class system reflected the Native Hawaiians close ties to the land. The Hawaiian's main social unit was the *ohana* or extended family, headed by a *huka.* In the Hawaiian custom, the *oha* is an offshoot of the taro plant, a historical food staple, and is related to many similar offshoots, the *ohana.* Therefore, the strength of the *ohana* was believed to lay in the land *('aina)* because the *oha* (offshoots) were planted in the earth and grew from its nutrients. Each nuclear family unit of the *ohana* was called a *hale* and headed by a *po'o.* In ancient Hawaiian civilization, this was the basic social system.

By 1795, King Kamehameha I was successful in unifying the Hawaiian Islands of Hawaii, Maui, Molokai, and Lanai. In 1805 the Island of Kauai was ceeded to the king. In 1819 King Kamehameha died and pressure from foreign influences mounted to make lands available for development to more non-Hawaiians. The non-Hawaiian who had land under development also favored the move because of their permissive only use of the land and not ownership. The result was the Great Mahele of 1848.[1]

[1] The term "Great Mahele" denotes actions by the government of Hawaii that resulted in the transformation of Hawaii's land system from total

The intent of the Great Mahele was to divide the land into three equal parts: that of the king, as private property; that of the chiefs, also as private property; and that of the commoners, initially held by the Hawaiian government in a trust. One criteria of the Great Mahele was that title to lands allocated to the king would be processed automatically; however, chiefs and commoners had to petition a land commission for title to lands within a fixed period of time. Government survey information indicates that after the Great Mahele, the king was granted approximately 984,000 acres; the chiefs, 1.6 million acres; and the lands held by the government totaled 1.4 million acres. During the Great Mahele commoners received only 28,000 acres of land. This is not to say that Native Hawaiians did not seek the land. There were approximately 13,000 native applicants for land grants but only 9,000 were actually granted. Many Native Hawaiians, even after receiving grants, lost or sold the land because of their lack of understanding of this new land system. Traditionally, Hawaiians believed that no human being could permanently own land. The land belonged to the gods; people were merely trustees and could not sell the land or misuse it. The Western concept of land ownership differed and consequently, the Native Hawaiians' lack of understanding and acceptance of the new land system was one reason why more Native Hawaiians were not able to benefit from the Great Mahele land division.

Another reason for nonparticipation by many natives was because the land grant applicant was required to pay $2 to $20 in land surveying costs. Few Native Hawaiians had the money. A case in point is land on the Island of Niihau. At the time of the Great Mahele, many Native Niihau residents petitioned the monarch to have lands surveyed for allocation. When the monarchy asked for payment for the surveying services, the natives were unable to pay. Therefore, their aboriginal homelands were sold to a prominant nonnative family for about $10,000. Dispossessed, many Hawaiians then left Niihau for larger islands. Today, the native population on Niihau is relatively small.

Of major importance after the Great Mahele was the Land Act of 1895.[2] It was the first attempt at a comprehensive compilation and codification of land laws in Hawaii. The Land Act of 1895 was also a significant impetus for the first attempt at homesteading on the islands. Under the act, public or government lands available for homesteading were classified as agricultural, pastoral, pastoral-agriculture or wastelands. The act also established a territorial Commission of Public Lands, forerunner to the Hawaii State Department of Land and Natural Resources.

This initial homestead project had three types of programs. The first was the homestead lease program. The applicant received a land lease for a 999-year term with no ethnic criteria requirement. Homeland leases under this program were provided to applicants only after a Certificate of Occupation was filed and certain terms were met.

Many Native Hawaiians and non-Hawaiians took advantage of the 999-year lease program which provided for the successorship of the leased lands.

The second type of homestead program was the right-of-purchase lease. These homeland leases were for 21 years. During the lease period after the third year, the lessee could purchase the leased land. Homesteaders for this program where chosen by general lottery.

The third homestead program was the cash freehold agreement. In essence, it was merely an agreement of sale. The applicant paid 25 percent of the land's valued price as down payment and paid the remaining 75 percent over a three-year period. Again, there was no ethnic criteria.

The first two types of homesteading programs were discontinued shortly after implementation.

In 1910 the Organic Act[3] was amended to provide that the Commissioner of Public Lands survey and open agricultural lands for homesteading upon demand by persons qualified as homesteaders. This move was a prelude to the Hawaiian Homes Commission Act (HHCA). Again, no ethnicity requirements were required for this type of homestead.

One of the converging forces during this era was the concern for the plight of the Native Hawaiians and the need to take corrective action to stop further deterioration of their numbers. It was acknowledged that Native Hawaiians were being alienated from their lands, and due to their inability to deal with the rapid health, social, educational and economic up-

government ownership to including private ownership. The "Great Mahele" began on March 8, 1848 when the Hawaiian ruler King Kamehameha III divided the land into private crown lands and government lands. Government land was to be systematically released to the kings, chiefs, and commoners.

[2] The land act was passed by the Hawaiian government before Hawaii became a United States territory in 1898.

[3] The Hawaiian Organic Act was enacted by the U.S. Congress in 1900. It established the government of the Territory of Hawaii and provided for the management and disposition of public lands.

heaval were faced with extinction. Also occurring at that time was a movement by community leaders to encourage racial consciousness among Native Hawaiians.

In 1921 the Hawaiian Homes Commission Act became law. Under this program, Native Hawaiians could obtain agricultural, pastoral, and residential homestead leases for 99 years. A Native Hawaiian was defined as "any decendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." The whole idea of HHCA was to get Native Hawaiians back on the land and supposedly, by the "sweat of their brow," they would rehabilitate their race.

3. Native Hawaiians Today

Winona Kealamapuana Rubin

Ms. Rubin presently serves as executive director of Alu Like, Inc., a statewide private nonprofit organization with its headquarters in Honolulu. Alu Like, Inc.'s major function is "assisting in the development of economic and social self-sufficiency for Native Hawaiians." It receives funds from the U.S. Department of Labor and the U.S. Department of Health, Education, and Welfare.

In 1975 Alu Like, Inc. conducted a statewide needs assessment of the Native Hawaiian community which it has continued to update. Some results are as follows:

In 1975 over 150,000 persons of Hawaiian ancestry lived in the State of Hawaii. Representing approximately 16.7 percent of the State's residents, Native Hawaiians are a young population with one-half being 18 years of age or younger. Seventy percent of the Native Hawaiians live on the Island of Oahu; 16 percent on the big Island of Hawaii; 10 percent on the Islands of Maui, Lanai, and Molokai combined; and 4 percent on the Island of Kauai.

Income and Welfare

In 1975, 62.6 percent of the Native Hawaiian people had no reportable income. Of those with income, nearly one-third (31.2 percent) received less than $4,000 a year.

Of the approximately 19,000 clients of the State Department of Social Services and Housing (DSSH) in 1975, 4,700 (25 percent) were adult Native Hawaiians. Of the 39,000 children receiving Aid to Families with Dependent Children (AFDC) assistance, 12,000 (31 percent) were Native Hawaiian. Overall, approximately 30 percent of the State's welfare recipients are of Hawaiian ancestry, almost double their percentage of the total state population of 16.7 percent.

Employment

In 1975 Native Hawaiian unemployment figures were almost double that for the State. Alu Like, Inc. identified significant blocks to employment as: 1) a lack of basic education, 2) stereotyping and low self-image, and 3) a lack of skill training and job readiness orientation.

Native Hawaiians occupy only eight percent of the professional and managerial positions statewide. For example, of the Department of Social Services and Housing's 551 social workers and administrators, only 45 (8 percent) are Native Hawaiian, although 30 percent of its clients are of Hawaiian ancestry.

Some efforts are reported by the private sector to employ Native Hawaiians at other than entry levels, but few have the necessary training to take advantage of the opportunitites. Increased efforts are also being made toward entrepreneurship among Native Hawaiians, particularly in areas consistent with their lifestyle (aquaculture, agriculture, crafts, etc.). Initial capital and technical skills in marketing projections are major roadblocks.

Education

Native Hawaiian educational needs are varied and pressing. Most Native Hawaiians expressed frustration and anger at the public education system. Many

see it as irrelevant to the current job market and a contradiction to their most cherished values of group cooperation and close personal relationship.

Public education in Hawaii is administered through one school district. In 1979 approximately 21 percent of the 173,000 students in the statewide district were of Hawaiian ancestry. Of the district's 224 schools, 33 (15 percent) have enrollments of 40 percent or more Hawaiian ancestry.

In 1979 the State Department of Education had a staff of nearly 9,475 teachers, counselors and principals, Of that figure, only 660 (7 percent) were of Hawaiian ancestry.

In the 1977–78 schoo! year Native Hawaiian children tested in the pub'ic elementary schools scored on the average 2 stanines (11-20 percent) below the state average in reading and mathematics. Tenth graders were also found to be in a similar pattern.

Student absenteeism is seen as a significant variable in the quality of the Native Hawaiian's educational experience. In the 1960's and early 1970's the Queen Liliuokalani Children's Center found that test scores and absenteeism indicated that alienation and lack of success in schools were prevalent among many Native Hawaiian students. An Alu Like, Inc. 1979 study also found student absenteeism to be a significant problem. At public schools with 40 percent or more Native Hawaiians, the absenteeism rate was an average of 43 days, almost a quarter of the school year.

•Native Hawaiian parents surveyed almost unanimously felt that it was important for their child to finish high school. Seventy-five percent of the parents felt college was also important. Yet, only five percent of the enrollment at the University of Hawaii, Manoa Campus, and ten percent of the total enrollment at state community colleges is Native Hawaiian.

Health

Native Hawaiians do not fare as well as other ethnic groups in the state by many health indicators. Native Hawaiians have higher than average physical health problems for chronic conditions such as cancer, diabetes, gout, coronary heart diseases, dental health, and child and family nutrition. Self-reports of health conditions, such as days in bed, hospital visits and time lost from work are comparable with all other groups; however, Native Hawaiians in all age groups have higher death rates than most other groups. The Native Hawaiian's life expectancy at birth is shorter than the state average by six to seven years.

The quality of health for older Native Hawaiians is also dismal. Approximately 25 percent of elderly Native Hawaiians age 65 years or more have either not registered for Medicare or are not enrolled in a health care program. Many elderly Native Hawaiians continue to make use of traditional spiritual and folk remedies. Professional help might be sought after traditional remedies have been exhausted, and then only if the health care provider's relationship is on a one to one basis.

The poor health and income of elderly Native Hawaiians leave them especially vulnerable to high health care costs and inadequate health services.

Housing

In 1975 half of the Native Hawaiian population reported owning their own homes; however, many homes were quite modest and on subsidized land. Ownership of real estate is the exception in Hawaii since land costs are among the highest in the nation. Many Native Hawaiians interviewed regard the Hawaiian homeland program as a possible means of returning to the land; however, many have also become disenchanted with the program. Only 25,000 acres (3,000 leasees) of the total 200,000 acres are occupied by Native Hawaiians. Of Native Hawaiian homeland leases, 87 percent are for residential purposes, 11 percent for farm and 2 percent for pastoral purposes. In 1979 there were over 5,700 applicants seeking homeland leases—90 percent for residential usage, 6 percent for farm and 4 percent pastoral.

Native Hawaiians as a group report a loss of pride and bitterness resulting from the historic loss of their homelands. Three-quarters of those interviewed expressed a desire to return to their self-sufficiency associated with living off the land and sea.

Legal Services

Legal assistance is a major problem among the Native Hawaiian population. Many Native Hawaiians are not eligible for poverty legal aid programs because they share an interest in land; yet, they cannot safeguard their property interest without selling the land to pay legal costs. Some of the more pressing legal problems facing the Native Hawaiian are: land registration, title search, land access, water

rights, and the preservation of sites of historic and religious significance.

Legal assistance on criminal matters is also needed. In 1977 arrest rates for persons of Hawaiian ancestry were lower or equal to the overall State rate; however, the incarceration rate for Native Hawaiians was twice as high. Since the types of crimes committed were not appreciably different from those of other ethnic groups, one explanation may be that Native Hawaiians are not receiving the same legal assistance and/or sentencing considerations. Disproportionate percentages of juvenile offenders are Native Hawaiian and come from homes receiving public assistance. Also disproportionate are the percentages of adult male offenders over 30 years of age having physical handicaps, mental health problems, and/or alcohol addiction.

In conclusion, the socioeconomic plight of Native Hawaiians is generally worse than other ethnic groups in the state.

4. Hawaiian Homelands: State Responsibility

Georgiana Padeken
Ms. Padeken presently serves as chairperson of the BHawaiian Homes Commission and Director of the State Department of Hawaiian Home Lands.

The Department of Hawaiian Home Lands (DHHL) was created on May 11, 1960 and is the state agency which administers the Hawaiian homes program. DHHL is one of several principal departments which currently make up the executive branch of the state government of Hawaii. In reality, the establishment of the DHHL was a matter of evolution rather than one of creation. Its establishment provided for the continuation of the Hawaiian homes program as Hawaii progressed in political status from an incorporated territory to the fiftieth State of the union. The Hawaiian Homes Commission Act (HHCA) was made a condition of Hawaii's admission into the union and the act was subsequently incorporated into the constitution of the State of Hawaii.

Although the purpose of HHCA was not specified in the act, the act's general intent was clearly stated at congressional hearings in 1920 and reinforced by subsequent opinions of the State attorney general's office in Hawaii. The HHCA's purpose was to permit the Native Hawaiian, a descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, a victim of change, to return to the land by means of a 99-year homestead lease for residential, agricultural, or pastoral uses. Under the terms of the act, the Native Hawaiian is merely a tenant on the land. Interest in the 99-year homestead lease beyond the natural life of the homesteader vests in those relatives who are at least 50 percent Hawaiian. Paternal assistance was to be provided by a commission also created by the U.S. Congress. This move by Congress was an attempt to protect the Hawaiian against himself and at the same time promote his well-being.

The Role and Function of the Department of Hawaiian Home Lands in the Administration of the Hawaiian Homes Commission Act

DHHL is headed by an executive board, the Hawaiian Homes Commission, whose members are nominated and appointed by the state governor, with the advice and consent of the state senate. Members of the commission serve for four-year terms. The commission is composed of eight members: three from the city and county of Honolulu; one from the county of Hawaii; two from the county of Maui, one of whom is a resident of the island of Molokai; one from the county of Kauai; and the eighth member is the chairman, selected at-large. The commission is specifically:

1. authorized to formulate and adopt rules, regulations and policies;
2. required to pay all expenses upon the presentation of itemized vouchers approved by the chairman of the Commission; and
3. required to submit an annual report to the state legislature upon the first day of each regular session and such special reports as are requested.

The commission may delegate to the chairman such duties, powers and authority as may be lawful or proper for the performance of the functions vested in the commission. The chairman, however,

reports to the commission for ratification of any action taken within the scope of delegated duties.

DHHL is also responsible for the control of "available lands" which are to be used and disposed of in accordance with the provisions of HHCA. The DHHL is required to:

1. place the Native Hawaiian on the land in order to insure his rehabilitation;
2. insure the alienation of such land be made impossible;
3. provide water in adequate amounts for all tracks of land; and
4. financially aid farming operations until such operations are well under way.

The Role and Function of the Department of Hawaiian Home Lands in the Management of the Hawaiian Homes Commission Act

The management role of DHHL is to promote, protect, and insure that the resources set aside by HHCA are maximized to the highest possible level and in the interest of Native Hawaiians. Management functions are under two categories:

1. those resources which are used by the general public for revenue generating purposes, such revenues to be used by DHHL; and
2. those resources for Native Hawaiians to be used for residential, farming or pastoral purposes.

As of July 31, 1979, a total of 2,997 leases had been awarded to Native Hawaiians under the act. This figure represents approximately 25,000 acres or 12.5 percent of the homeland trust. As of the same date, a homestead waiting list totaled 6,310 applicants; 90 percent for residential lots, 6 percent for agricultural, and 4 percent for pasture lots.

Previous to 1975, DHHL's only independent source of revenues was through the general leasing of its lands. From 1975 to 1978, DHHL had $40,611,140 available for programming. Of that total, over 77 percent came from state legislature appropriations. In the future, the DHHL will require continued funding from the state legislature and hopefully from Federal and private sources.

Susumu Ono

Mr. Ono presently serves as chairman of the Hawaii Board of Land and Natural Resources and director of the State Department of Land and Natural Resources. Appointed by the governor and confirmed by the state senate, Mr. Ono oversees the management and administration of public lands, including certain lands set aside under the Hawaiian Homes Commission Act.

Hawaiian Homelands

When the Hawaiian Homes Commission Act (HHCA) was passed by the U.S. Congress in 1921 certain territorial public lands were designated as "available lands" and assumed the status of Hawaiian homelands. These lands, approximately 200,000 acres, were then put under the jurisdiction of the Hawaiian Homes Commission. Although the "available lands" were under the jurisdiction of the commission, HHCA specified that those homelands not presently needed in the Hawaiian Homes Commission programming could be leased out to the general public by the Commissioner of Public Lands. At its peak, approximately 70,500 acres of homelands were involved.

HHCA also provided that the proceeds from the leasing of Hawaiian homelands were to be turned over to the Hawaiian Homes Commission, as were 30 percent of all revenues from territorial public lands in sugar cultivation and from water licenses up to a $5 million ceiling. Under this arrangement, about $250,000 per year was turned over to the Hawaiian Homes Commission by the Commissioner of Public Lands.

In 1959 when Hawaii was granted statehood, the HHCA became a part of the State constitution and the responsibilities of the Commissioner of Public Lands were assumed by the Board of Land and Natural Resources (BLNR). After statehood, the BLNR continued, upon request from the Department of Hawaiian Home Lands (DHHL), to lease homelands to the general public and to turn over receipts from those leases to DHHL along with 30 percent of the revenues from state-owned sugar lands and water licenses.

In recent years, the Hawaii state legislature has authorized the DHHL to handle the public leasing of Hawaiian homelands. Accordingly, as leases executed by BLNR covering Hawaiian homelands expire, the land is returned to the jurisdiction of DHHL for administration and management. In 1979 approximately 17,000 acres of homelands are under lease from BLNR. It is anticipated that within the next few years DHHL will be executing most, if not all, of its leases.

During the 1978 Hawaii State Constitutional Convention, Article XI, Section 1 of the State constitution was amended. Article XI now stands as

Article XII and provides that 30 percent of the receipts derived from the leasing of state-owned cultivated sugar lands and from water licenses shall be transferred to a Native Hawaiian Rehabilitation Fund under HHCA, Section 213. It also provides that 30 percent of State receipts from lands cultivated as sugar cane lands shall be transferred to the Native Hawaiian Rehabilitation Fund whenever such lands are sold, developed, utilized, transferred, set aside, or otherwise disposed of for purposes other than the cultivation of sugar cane. No ceiling was imposed on this funding source. Accordingly, as soon as the number of acres in sugar cultivation have been determined and certain other legal questions answered, the 30 percent payments to DHHL, without a ceiling, will resume.

5. Hawaii Constitutional Convention of 1978

Adelaide DeSoto

Ms. DeSoto presently serves as manager of the Waianae Satellite City Hall in Waianae, a predominantly Native Hawaiian community on the island of Oahu, Hawaii. In 1978 Ms. DeSoto served as a delegate to the Hawaii State Constitutional Convention and was chairperson of the Committee on Hawaiian Affairs. At the constitutional convention several amendments were proposed and ratified which addressed Native Hawaiians and Hawaiians socioenomic plights, traditions, and rights and the Hawaiian homeland program. Also proposed at the constitutional convention was the creation of a state level Office of Hawaiian Affairs.

The primary goal of the Committee on Hawaiian Affairs at the 1978 state constitution convention was to address Article XI of the Constitution that dealt with the Hawaiian Homes Commisssion Act (HHCA). The purvue of the Committee on Hawaiian Affairs also included, but was not limited to : 1) the protection and perpetuation of ancient Hawaiian sites, rights, traditions, and heritage; 2) the implementation of teaching the Hawaiian language and culture in our public schools; 3) the preservation of Native Hawaiian vegetataion and crops; and 4) the development and implementation of constitutional provisions which would address the many problems of education, social and economic opportunities as they relate to Native Hawaiians.

The Committee on Hawaiian Affairs was composed of a broad cross-section of Hawaii's social and economic strata, who were representative of almost every ethnic group in the state.

During its research, the committee found that although approximately 200,000 acres of land had been set aside by HHCA, only approximately 28,000 acres were presently being utilized by Native Hawaiians. The committee also found that over 20,000 acres of homelands were unaccounted for or "lost", and 24,000 to 26,000 acres had been transferred from the jurisdiction of the Department of Hawaiian Home Lands (DHHL) by state and Federal executive orders. The committee also learned that about 113,000 acres of the homelands were being leased to non-Native Hawaiians under general lease agreements for industrial and economic development, farming, and large ranches.

Prior to the 1978 constitutional convention, the committee members really didn't have any idea of exactly how much land was involved in the trust or where it was located. We also didn't realize that DHHL was forced to lease much of its land to the general public to pay for the DHHL's operating costs, the only state department required to do so. In many instances, the maximum amount of money realized from some of these leases was a little over three dollars per acre. These were the kinds of revenues that DHHL was expected to exist on.

The committee felt these findings were atrocious and concluded that the HHCA had built-in failures. With that in mind, the Committee on Hawaiian Affairs looked at the act and how it could better serve Native Hawaiians without jeopardizing their existing status under the act. Native Hawaiians get very nervous when someone wants to look at Hawaiian homelands, the few crumbs that we Native Hawaiians have in Hawaii. Many of these

fears have been exacerbated by recent congressional action concerning American Indians, and the Committee on Hawaiian Affairs felt that the time was not right for Congress to look at HHCA.

As for DHHL, the committee found out facts about the department that were also atrocious. Before the committee began its research and analysis of the homestead program, few of us had any idea of exactly how the department functioned. I personally had been a homestead applicant for 33 years.

The committee, noting that the intent of the HHCA was to "rehabilitate" the Native Hawaiian, found that whenever a director was appointed to administer the homestead program, the director appeared to determine the working definition of rehabilitation. The definition of rehabilitation has never been acceptably documented; so, consequently, the ones who suffer are Native Hawaiians, the beneficiaries.

Recognizing that one of the primary purposes of DHHL was to provide a means to locate more Native Hawaiians onto the land, the committee attempted to outline some policies for DHHL. Some of the proposed changes were as follows. Article XI, Section 1 of the state constitution stated that "the legislature may from time to time make additional sums available. . . ." to DHHL. The committee changed that phrase to read:

> The legislature *shall* make sufficient sums available for the following purposes: 1) development of home, agriculture, farm and ranch loans; 3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; 4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3), and (4) herein. . . .

In proposing this change, the committee was saying to the state of Hawaii, "You have a fiduciary responsibility to Native Hawaiians because of your trust agreement with the U.S. Congress in the Hawaii Adminissions Act, 1959."

To Section 1 of Article XI, we also added:

> Thirty percent of the state's receipts derived from the leasing of cultivated sugar cane lands under any provision of law or from water licenses shall be transfered to the Native Hawaiian Rehabilitation Fund, section 213 of the Hawaiian Homes Commisssion Act, 1920, for the purposes enumerated in that section. Thirty percent of the state receipts derived from the leasing of lands cultivated as sugercane lands on the effective date of this section shall continue to be so transferred to the native Hawaiian rehabilitation fund whenever such lands are sold, developed, leased, utilized, transferred, set aside or otherwise disposed of for purposes other than the cultivation of sugarcane. There shall be no ceiling established for the aggregate amount transferred into the Native Hawaiian Rehabilitation Fund.

With the monies derived from sugarcane lands, we also established eight special funds which were collectively called the Native Hawaiian Rehabilitation Fund. This fund was established to ensure that, even if sugarcane lands were used for private housing, the monies realized would go to the Native Hawaiian's rehabilitation. In response to the many proposed changes, Article XI was changed to Article XII.

The Committee on Hawaiian Affairs also took a look at HHCA. We tried to make adjustments to the act without tampering with its rules and regulations. The committee felt that to lock DHHL into constitutional rules and regulations would have a crippling effect upon the department's ability to provide relevant programing. Therefore we proposed the following changes. Section 204(2) of HHCA gave DHHL the authority to return "available lands" not under use to the state Board of Land and Natural Resources (BLNR). The "available lands" could then be leased out by BLNR *as provided in Chapter 171, Hawaii Revised Statutes* or [could] be retained for management by the department. The underlined phrase was changed to "as provided under Section 212 of [the Hawaiian Homes Commission Act.]"[1] This change is an attempt to insure that before homeland leases are granted to non-Native Hawaiians, beneficiaries of the act will have the opportunity to lease homelands for economic self-sufficiency endeavors. The Committee on Hawaiian Affairs felt that DHHL should also make homelands available to organizations or associations owned or controlled by Native Hawaiians for commerical, industrial, or other business purposes.

[1] Section 212 of the Hawaiian Homes Commission Act (HHCA) provides that any non-homelands leases executed by the Board of Land and Natural Resources (BLNR) are subject to the duty of the board to terminate these leases and return leased lands to DHHL when the department decides that the lands are required for HHCA purposes.

Section 204(3) stated: "The department shall not lease, use nor dispose of more than twenty thousand (20,000) acres of the area of Hawaiian homelands, for settlement by Native Hawaiians, in any calendar five-year period." The committee deleted Section 204(3) in total.

Section 204(4) stated:

> The department may, with the approval of the governor and the Secretary of the Interior, in order to consolidate its holdings or better effectuate the purposes of this Act, exchange the title to available lands for land, publicly owned, of an equal value. . . No such exchange shall be made without the approval and of two-thirds of the members of the board of land and natural resources.

From this Section, (now section 204(3), the committee deleted the approval authority of the governor. The role of the U.S. Secretary of the Interior was retained in response to requests from Hawaiian homesteaders for a system of checks and balances. The committee also included privately owned lands in addition to public lands that can be exchanged for homelands. These changes will allow the department to provide homesteads in areas with little available public lands but with a large concentration of eligible Native Hawaiians.

Section 221 of the Hawaiian Homes Commission Act was amended by adding the following paragraph:

> Water systems in the exclusive control of the department shall remain under its exclusive control. If any provision or the application of such provision is inconsistent with the provision contained herein, this section shall control. Water systems include all real and personal property together with all improvements to such systems, acquired or constructed by the department for the distribution and control of such water for domestic or agricultural use.

During the 1978 constitutional convention, the Committee on Hawaiian Affairs established the basis for a new state level Office of Hawaiian Affairs. The impetus behind such a move was the need for more people of Hawaiian ancestry making policy decisions that directly and primarily affect Native Hawaiians. The committee and many in the Hawaiian community also saw a need for a vehicle that would identify existing Federal, state, and local resources for Native Hawaiians and coordinate those resources with little or no overlapping.

In summary, delegates to the Hawaii State Constitutional Convention of 1978 ratified amendments to the state constitution that:

1) mandated that the lands granted to the state of Hawaii by the Admissions Act (excluding "available lands") shall be held by the state as a public trust for native Hawaiians and the general public,
2) gave statutory existence to the Office of Hawaiian Affairs which was to function as a public trust agency " for native Hawaiians and Hawaiians."
3) allocated a certain "pro rata" part of the income and proceeds from the lands granted to the state by the Admissions Act (excluding "available lands") to be managed and administered by the Office of Hawaiian Affairs,
4) defined the term "Hawaiian",[3] and
5) enabled the elections of at least nine persons to the board of trustees of the Office of Hawaiian Affairs from among Hawaiians and to be elected by Hawaiians.

[3] Persons of Hawaiian ancestry were categorized by the committee into two groups: 1) A Native Hawaiian is any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, provided that the term identically refers to a descendent of such blood quantum of such aboriginal people which exercised sovereignty and subsisted in the Hawaiian Island in 1778 and which thereafter continued to reside in Hawaii. 2) A Hawaiian is any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which thereafter have continued to reside in Hawaii.

6. Legal Developments

Ronald Albu

Mr. Albu presently serves as a staff attorney with the Legal Aid Society of Hawaii in the land, water and native Hawaiian rights unit. In 1975 the legal aid society filed a lawsuit against the Hawaiian Homes Commission for violations of the Hawaiian Homes Commission Act (HHCA). In 1978 in the same case the Society filed a petitition for certiorari to the United States Supreme Court regarding the rights of Hawaiian homeland beneficiaries. The question presented was whether or not Native Hawaiian beneficiaries of HHCA adopted by Congress for their special benefit, had the right to obtain judicial review in Federal court for violations of the act and breaches of trust provisions imposed on Hawaiian homeland programs by Congress in the Hawaii Admission Act, 1959. [1]

At the time of the overthrow of the Hawaiian Government in 1893, about two-thirds of the islands' land area were given to the United States Government by the new Hawaiian revolutionary government. Native Hawaiians received no land at that time. Out of the two and one-half million acres the United States received, the HHCA trust was established with approximately 203,000 acreas of land. This move by the U.S. Congress was a recognition by the United States of the hardships caused to the Native Hawaiian people as a result of the illegal action taken against them and their traditional government.

My initial contact with Hawaiian homelands issues involved the Keaukaha-Panaewa Community Association on the big island of Hawaii. In 1975 I and other attorneys heard allegations from Native Hawaiian homesteaders that 25 acres of prime Hawaiian homelands were to be used for a flood control channel being constructed by the county of Hawaii. The homesteaders were understandably upset because they had been trying for years to get the land surveyed and parceled out to them for farming as directed under provisions of HHCA. Upon investigation of the allegations, a number of questionable facts surfaced. In 1972 the county of Hawaii went to the Hawaiian Homes Commission and asked for 12 acres of homelands for a flood control project. An equivalent amount of land in value was to be made available to the commisssion from state lands. In 1973, 12 acres of homelands were approved by the Hawaiian Homes Commission for the flood control project, and in 1975 construction began. To date, no state lands have been released to the Hawaiian Homes Commission in exchange, nor has there been a good faith effort made by the state to consummate the exchange. To my knowledge, no paper work has ever been initiated or exchangeable state lands identified.

One of the conditions of Hawaii's statehood imposed by the U.S. Congress was that the state of Hawaii accept HHCA and administer it as a trust for people of Hawaiian ancestry.

A legal trust has very severe standards. The trustee has to take care of the trust as strictly and carefully as he would care for his own property. He cannot give it away and has to maximize its benefits

[1] Plaintiffs Brief for Certiorari at 8, Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, 588F. 2d 1216 (9th Cir. 1978).

for the beneficiaries. The trustee also cannot let any other entity use the trust unless compensation is given to its beneficiaries. In the case of the flood control project, Hawaiian homelands were released to the county of Hawaii with no compensation to Native Hawaiians. In fact, Hawaii county originally asked the Hawaiian Homes Commission for 12 acres of homelands, but later reported that 25 acres were needed to complete the project. The additional acres of homelands were released to the county. In 1975 the chairman of the Hawaiian Homes Commission was asked by the legal aid society to take remedial action on the land releases and the response was, "we have more important matters to attend to." On July 23, 1975, the Native Hawaiian beneficiaries sought a legal injunction against the county of Hawaii to stop further construction on the water project.

The legal aid society is knowledgeable of other cases of inappropriate usages of Hawaiian homelands, including the issuance of state governor executive orders. In most states, the governor has the authority to transfer unencumbered state lands to a government agency for a public use. Section 206 of HHCA, however, prohibits the governor from using the same executive power over Hawaiian homelands which applies to other state lands. Nevertheless, the state of Hawaii, by executive order, has transferred Hawaiian homelands to other entitities for use as public airports, schools, parks, forest and game reserves, right of ways, and public services. According to the 1976-77 annual report of the Department of Hawaiian Home Lands, a total of 31 executive orders have been issued involving 16,863 acres or 8.9 percent of the total Hawaiian homeland trust.

One justification used for the transfer of homelands was that Native Hawaiians could still use the lands as members of the general public. This attitude was and still is unacceptable to the Native Hawaiian community. If a private citizen owns property and the government wants it for a park, the government condemns it and pays the owners just compensation. The owner would, as a member of the general public, still be able to use the park. Native Hawaiians should also be justly compensated.

In 1975 the Hawaii state attorney general issued an opinion stating that the governor's power to set aside public lands by executive order does not extend to Hawaiian homelands. To date no action has been taken to remedy the 31 land transfers of Native Hawaiian homelands.

We also found that although HHCA says the trust involves 203,000 acres of land, only about 190,000 acres to date have been accounted for. For example, in the Waimanalo area there is supposed to be 4,000 acres of Hawaiian homelands. State records only document 2,000 homeland acres in the area. Where are the missing 2,000 acres?

Of the approximately 190,000 acres of Hawaiian homelands identified, Native Hawaiian homesteaders occupy only 25,000 acres or about one-eighth of the total homeland trust. About 125,000 of the acres are being used by non-Hawaiians. These non-Hawaiian users include Federal, state, and county governments, as well as private parties under leases, licenses, and permits. The income from these contracts are minimal. In 1976-77 the Federal Government paid an average rental per acre for homelands of 45 cents; the state of Hawaii paid 12 cents per acre; and the counties paid $3.10 per acre. I think the current fair market value of land in Hawaii will support the inappropriateness of these rates. Native Hawaiians are not even getting fair market value for their homelands and cannot bring suit to protect their homeland trust.

In 1975 the Legal Aid Society of Hawaii brought suit in the U.S. District Court to seek redress on behalf of HHCA trust beneficiaries. The district court judge ruled that the Hawaiian Homes Commission and the state of Hawaii had breached their trust obligations to Native Hawaiians in four ways: 1) allowing the use of Hawaiian homelands under the land exchange provisions without first satisfying the prerequisites for an exchange, 2) issuing a license for an unlawful purpose, 3) permitting the uncompensated use of the homelands, and 4) allowing the needs of the general public, as opposed to the needs of the trust beneficiaries, to control decisions made concerning the homelands.

The Hawaiian Homes Commission filed an appeal to the ruling with the Ninth Circuit Court of Appeals. The ninth circuit court held that the district court did not have the jurisdiction to hear the case and stated that Native Hawaiian beneficiaries of HHCA had no right of action to challenge breaches of the trust. The court of appeals ruled that the right to bring suit for such breaches of trust is reserved exclusively to the United States. The U.S. Department of Justice filed an amicus curiae brief with the ninth circuit court asking that Native

Hawaiians be allowed to bring suit in their own behalf.[2] In 1979 the Legal Aid Society of Hawaii filed a petition for certiorari to the U.S. Supreme Court for its consideration during its October 1979 session. The legal aid society and the Native Hawaiian beneficiaries hope the court will rule that Native Hawaiians do have the right to bring suit in Federal court for breaches of a trust established by Congress and accepted by the state of Hawaii as a condition of admission into the United States.

[2] The brief stated that as beneficiaries of the trust, Native Hawaiians had standing in court to compel proper administration of the trust (Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, No. 77-1044 (9th Cir. filed May 1978).

7. Epilogue

Following the 1978 filing of a writ of certiorari by the Legal Aid Society of Hawaii on behalf of Native Hawaiian trust beneficiaries, the U.S. Supreme Court denied the request for review of the homeland issue during its winter 1979 session.[1] This decision let stand the 1978 U.S. Ninth Circuit Court of Appeals ruling that the right to bring suit for breaches of the homeland trust is reserved exclusively to the United States.[2] According to Ronald Albu of the Hawaii legal aid society, the only remaining remedy for Native Hawaiian beneficiaries seeking recourse for homeland trust violations is legal action by the U.S. Department of Justice.[3]

During the 1978 state constitutional convention, a Native Hawaiian Rehabilitation Fund (NHRF) was proposed and later ratified by the voters. The purpose of the fund is to improve the educational, economic, political, social and cultural life of Native Hawaiians. The Department of Hawaiian Home Lands (DHHL) estimates that $300,000 to $400,000 per year will be available from state sources for implementation of NHRF's objectives. The Hawaiian Home Commission requested DHHL to plan for NHRF. Twenty statewide public hearings have been scheduled by DHHL during the winter and spring of 1980 to obtain community advice for NHRF.[4]

The 1978 constitutional convention also proposed a state Office of Hawaiian Affairs (OHA) which was approved by the voters. The purpose of OHA is to identify existing Federal, state and local resources for use by Native Hawaiians and to coordinate those resources to better service the Native Hawaiian community. The process has begun to elect a nine number board of trustees in November 1980 to oversee OHA. Only state citizens who are decendants of Hawaii's aboriginal peoples may vote for OHA board members.[5]

During the Advisory Committee consultation, Georgiana Padeken stated that the policy for the public leasing of homelands had been modified. As of July 31, 1979 a total of 2,997 homestead awards (25,000 acres) have been leased to Native Hawaiians with 6,310 applicants remaining on waiting lists. As of the same date, approximately 122,000 acres of homelands were under leases and licenses to the general public. Pursuant to a 1978 state constitutional amendment, DHHL's policy is that "lands placed out on a general auction (lease or licenses) must first be made available to Native Hawaiians." The state has thus placed a moratorium on the public leasing of homelands until a procedure can be designed to implement the constitution amendment.[6]

As of October 1978 the Hawaii Advisory Committee learned that 31 executive orders have been issued by the state of Hawaii involving 16,836 acres of homelands. According to Georgiana Padeken of DHHL, ". . .the use of Hawaiian Home Lands under executive order is now under litigation,

[1] Keaukaha-Panaewa Assoc. v. Hawaiian Homes Commission, 100 S. Ct. 49 (1979) (No. 78-1539). (Denial of a writ of certiorari does not signify the Supreme Court's views about the legal merits of a case.)
[2] 588 F.2d 1216 (9th Cir. 1978).
[3] Ronald Albu, attorney, Legal Aid Society of Hawaii, staff interview, January 24, 1980.
[4] Hawaii State Department of Hawaiian Home Lands. Position paper on the Native Hawaiian Rehabilitation Fund. February 1980.
[5] Georgiana Padeken, director, Department of Hawaiian Home Lands. Testimony before the Hawaii State Advisory Committee, U.S. Commission on Civil Rights, August 27, 1979, Honolulu, Hawaii.
[6] Ibid.

[however] the position of the Department of Hawaiian Home Lands [is] that executive orders [involving homelands] are illegal. . . ."[7]

As a result of the Advisory Committee's inquiry, the U.S. Department of the Interior acknowledged that:

> . . .it is possible that the state government may have taken actions with respect to homelands in the past without the required approval of the Secretary [of the Interior]. . .[and] consideration will be given to establishing appropriate procedures to ensure that state action is, in the future, submitted for Secretarial approval where required by law.[8]

The role of the U.S. Department of the Interior in the enforcement of HHCA is viewed by the Hawaii Advisory Committee as extremely significant in that the ". . .Department would be responsible for recommending to the U.S. Department of Justice that possible breaches of the trust be investigated and that litigation to enforce the trust. . .be initiated where necessary."[9]

[7] Ibid.

[8] Fredrick N. Ferguson, deputy solicitor, U.S. Department of the Interior, letter to Philip Montez, regional director, Western Regional Office, U.S. Commission on Civil Rights, August 27, 1979.

[9] Ibid.

Appendix A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 27 1979

Mr. Philip Montez, Director
Western Regional Office
United States Commission on Civil Rights
312 North Spring Street, Room 1015
Los Angeles, CA 90012

Dear Mr. Montez:

The Secretary has asked me to respond to your letter of August 1, 1979, regarding the responsibility of the United States for enforcement of the provisions of the Hawaiian Homes Commission Act, 1920, and the Hawaii Admission Act of 1959 relating to the Hawaiian home lands.

Your first question relates to section 5 of the Hawaii Admission Act, Act of March 18, 1959, Public Law 86-3, §5 , 73 Stat. 5, as amended by Act of July 12, 1960, Public Law 86-624, §41, 74 Stat. 422. Under section 5(b) of the act, title to the Hawaiian home lands held by the United States for the benefit and rehabilitation of native Hawaiians under the Hawaiian Homes Commission Act, 1920, was transferred to the state. Under section 5(f) of the act, these lands, as well as the proceeds and income therefrom, are to be held by the state in trust for the betterment of the conditions of native Hawaiians as per the provisions of the Hawiian Homes Commission Act, 1920. See Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, 588 F. 2d 1216, 1218, n. 2 (9th Cir. 1978) (petition for certiorari filed, No. 78-1539, April 9, 1979, 47 U.S.L.W. 3684). Use of the home lands for any other object "shall constitute a breach of trust for which suit may be brought by the United States." Hawaii Admission Act, §5(f). The answers to your specific questions with respect to these provisions are as follows.

> (a) Section 5(f) of the Hawaii Admission Act confers enforcement and litigation authority on the United States. The Department of Justice is responsible for filing and prosecuting litigation on behalf of the United States; the Department of the Interior does not have independent litigation authority. 28 U.S.C. 516 (1976 ed.). With respect to legal matters relating to the powers and duties of the Secretary of the Interior or laws administered by the Department of the Interior, the Office of the Solicitor is responsible for making

best copy available

recommendations to the Department of Justice concerning the initiation of litigation. Although section 5(f) does not expressly refer to the Secretary of the Interior as the officer responsible for enforcing the trust, it is the Department's position that given the Secretary's longstanding involvement with Hawaiian home lands under the Hawaiian Homes Commission Act, 1920, this Department would be responsible for recommending to the Department of Justice that possible breaches of trust be investigated and that litigation to enforce the trust under section 5(f) be initiated where necessary.

(b) The use of the word "may" in section 5(f) suggests that the authority of the United States to prosecute breaches of the trust under this section is discretionary. In the area of the United States' relationship with Indians and Indian tribes, which may or may not be analogous to the relationship between the United States and native Hawaiians under section 5(f), some courts have suggested that the federal government's trust responsibility requires the United States to sue on behalf of Indians or Indian tribes to protect Indian rights under federal law, or be liable to the Indians for breach of trust for any loss resulting from the failure to sue. See United States v. Oneida Nation of New York, 477 F. 2d 939 (Ct. Cl. 1973); Mason v. United States, 461 F. 2d 1364, 1372-73 (Ct. Cl. 1972), rev'd., 412 U.S. 391 (1973); cf. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 663, n. 16, 665 (D. Me. 1975), aff'd., 528 F. 2d 370, 375, 379 (1st Cir. 1975). As the potential liability of the United States may be involved, however, the Department cannot take a position on this issue outside the facts of a particular case in which the question is presented.

(c) This Department would recommend prosecution of any breach of trust which it found to be supported by the facts and legally meritorious.

(d) We have been unable to find any instance in which any action has been filed by the United States for breach of trust under section 5(f).

(e) The Ninth Circuit in construing section 5(f) recently stated: ". . . the state is the trustee . . .. * * * The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee." Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra, 588 F. 2d at 1224, n. 7. It is true that the state, rather than the United States, holds title to the Hawaiian home lands for the use and benefit of native Hawaiians, while the United States' trust responsibility with respect to Indian lands is due in large part to the fact that the United States holds legal title to the land in trust for Indian tribes and individual Indians. Nonetheless, it is the Department's position that the role of the United States under section 5(f) is essentially that of a trustee. Prior to statehood, the United States itself held title to the home lands in trust for native Hawaiians. The terms of that trust were defined by the provisions of the Hawaiian Homes Commission Act, 1920. Although the United States transferred the lands and the responsibility for administering the act to the state under the Admission Act, the Secretary of the Interior retained certain responsibilities, discussed below, which should be considered to be more than merely ministerial or nondiscretionary. The United States further provided that no substantive changes in the act, and thus in the terms of the trust itself, may be made without the consent of Congress and also retained authority to prosecute breaches

> of the trust. Taken together, the responsibilities of the federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the act while making the state its instrument for carrying out the trust. Cf. Act of August 4, 1947, c. 458, §1, 61 Stat. 731, 25 U.S.C. 355 note (1976 ed.); Springer v. Townsend, 336 F. 2d 397 (10th Cir. 1964) (state court, in approving, pursuant to federal statute, conveyance of restricted Indian land, acted as federal instrumentality).

Your second question relates to the duties of the Secretary of the Interior under sections 204(1), 204(4), and 212 of the Hawaiian Homes Commission Act, 1920, as amended. Section 204(1) provides that any "available lands" which were under lease on the date of enactment (July 9, 1921) would not become "home lands" until the lease expired or until the lands were withdrawn from the operation of the lease by the government authorities responsible for public lands. Where such lands were covered by a lease containing a withdrawal clause, the lands could be withdrawn for use as home lands whenever the Commission (now the Department of Hawaiian Home Lands, Haw. Rev. Stat. §26-17) gave notice, with the approval of the Secretary of the Interior, that the lands were needed for the purposes of the act. It is unclear whether any "available lands" which were under lease in 1921 are still under lease. If not, the authority of the Department and the Secretary under this subsection is now obsolete. Under section 204(4), the Department of Hawaiian Home Lands is authorized to exchange title to "available lands" for public lands of equal value in order to consolidate its holdings or better carry out the purposes of the act. This authority is subject, however, to the approval of both the governor of the state and the Secretary of the Interior. Under section 212, the Department of Hawaiian Home Lands is authorized to return "home lands" to the control of the state government, in which case the lands may be held as public lands and disposed of by general lease. All such leases, however, may be terminated if the Department, with the approval of the Secretary of the Interior, gives notice that the leased lands are again required for the purposes of the act. The Secretary's authority under these sections is not merely ministerial or nondiscretionary, but rather calls for independent judgment and must be exercised consistent with the purpose and provisions of the act. The answers to your specific questions with respect to these provisions are as follows.

(a) The Secretary's authority under section 204 and 212 has not been expressly delegated under departmental regulations. In the past, the authority to approve exchange deeds has been exercised either by the Secretary or an Assistant Secretary upon recommendation of the Solicitor. This practice could also be followed under current departmental regulations.

(b) No formal guidelines or procedures have been established to ensure that state activity concerning Hawaiian home lands is approved by the Secretary where required by the act. In the past, the Department has relied upon the appropriate state officials to forward documents requiring secretarial approval to the Department since the Secretary's approval is necessitiated only after initial action by the state agencies. However, since it is possible that the state government may have taken actions with respect to home lands in the past without the required approval of the Secretary, see Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra, consideration will be given to establishing appropriate procedures to ensure that state action is, in the future, submitted for secretarial approval where required under the act.

(c) Departmental records indicate that five exchange deeds have been submitted for approval and approved under section 204(4) of the act since the enactment of the Hawaii Admission Act, as follows:

> Three deeds of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on April 9, 1962;
>
> One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Assistant Secretary Carver on June 19, 1962; and
>
> One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on March 16, 1967.

I hope that this information will be helpful to the Commission in its study. If the Department can be of further assistance, please feel free to write Thomas W. Fredericks, Associate Solicitor, Division of Indian Affairs, Department of the Interior, Washington, DC 20240.

Sincerely,

Frederick N. Ferguson

DEPUTY SOLICITOR

Appendix B

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES
DIVISION
Washington, D.C. 20530

August 13, 1979

Mr. Philip Montez
Regional Office Director
Western Regional Office
United States Commission
on Civil Rights
312 North Spring Street
Los Angeles, California 90012

Dear Mr. Montez:

This is in response to your letter of August 1, 1979, concerning the Hawaii Admission Act of March 18, 1959, 73 Stat. 4, as amended, and the Hawaiian Homes Commission Act of 1920, as amended, 42 Stat. 108. The identical letter has been sent to the Secretary of the Interior.

As your letter points out, section 5(f) of the Admission Act requires that certain lands, including the Hawaiian home lands, conveyed by the United States to the State ". . . be held as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of the native Hawaiians . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use." As noted by the Ninth Circuit, section 5(f) contains an ambiguity since it arguably provides that the Hawaiian home lands may be used for the same general public purposes as other federal lands conveyed to Hawaii pursuant to the Admission Act. Keaukaha - Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1218, n. 2 (9th Circuit, 1979). A petition for certiorari is now pending in the Supreme Court. The subsection further provides that: "such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of the said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."

In response to the specific questions raised in your letter, we offer the following:

1a. The Department of Justice would have the exclusive litigation authority if suit were brought by the United States to enforce the trust. The Department of the Interior has no authority to file lawsuits on behalf of the United States. It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated. In this respect, we disagree with the Ninth Circuit's decision in Keaukaha - Panaewa, supra.

1b. The authority to initiate litigation is discretionary, rather than mandatory.

1c. If a request is made to the Department of Justice by the Secretary of the Interior to initiate legal action against the State of Hawaii, we would review the request to determine if the case has legal merit and factual support. If we find that a meritorious case exists, we would file an action.

1d. No actions have been filed by the United States.

1e. The State of Hawaii has the responsibility to administer the lands in accordance with the Admission Act and the State's constitution and laws. If the State fails to fulfill this responsibility, the United States is authorized to bring suit to require the State to fulfill its responsibility.

2. The series of questions in Part 2 relate to the function of the Secretary of the Interior. We defer to the Department of the Interior with respect to these issues.

Sincerely,

James W. Moorman

James W. Moorman
Assistant Attorney General
Land and Natural Resources Division

* U. S. GOVERNMENT PRINTING OFFICE : 1980 629-708/2996

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

BULK RATE
POSTAGE AND FEES PAID
U.S. COMMISSION ON CIVIL RIGHTS
PERMIT NO. G73

best copy available